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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 531

ALEXANDESUS BELLASKUS, PETITIONER

v.

L. D. CROSSMAN, OFFICER IN CHARGE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 44–49) are reported at 164 F. 2d 412.

JURISDICTION

The judgment of the circuit court of appeals was entered December 2, 1947 (R. 50). The petition for a writ of certiorari was filed January 16, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner is an alien who has been ordered deported to Greece. In 1939 a full hearing was held on a petition for habeas corpus challenging the legality of the order, and the writ was dismissed. In his present habeas corpus petition, he tendered issues which had not been determined in the prior proceeding. The question is whether, in the circumstances of this case, petitioner is entitled to a hearing on such new matters.

STATUTES INVOLVED

Section 19 of the Act of February 5, 1917, c. 29, 39 Stat. 874, 889 (8 U. S. C. 155), as it read at the time of the issuance of the warrant of deportation, provided:

> * * * any alien who manages or is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported * * * In every case where any person is ordered deported from the United States under the provisions of this Act, * * * the decision of the Secretary of Labor shall be final.

Section 20 of the same Act (8 U. S. C. 156), as it read at the time of the issuance of the warrant of deportation, provided:

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The deportation of aliens provided for in this Act shall, at the option of the Attorney General, be to the country whence they came or to the foreign port at which such aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which they embarked for such territory; or, if such aliens entered foreign contiguous territory from the United States and later entered the United States, or, if such aliens are held by the country from which they entered the United States not to be subjects or citizens of such country, and such country refuses to permit their reentry, or imposes any condition upon permitting reentry, then to the country of which such aliens are subjects or citizens, or to the country in which they resided prior to entering the country from which they entered the United States.

STATEMENT

On October 25, 1935, after a hearing before an immigration inspector, a warrant was issued by the Assistant to the Secretary of Labor ordering that petitioner be deported to Greece under Section 19 of the Immigration Act of February 5, 1917, upon a finding that he was an alien who was "managing a music and dance hall * * * habitually frequented by prostitutes" (R. 12–13).

On November 29, 1939,[1] petitioner filed in the District Court for the Southern District of Texas

[1] From 1935 to 1939, the Immigration and Naturalization Service, as appears from the files of that office, was endeavor-

a petition for a writ of habeas corpus in which he alleged that there was no evidence that he owned any interest in the dance hall, that he was not given a fair hearing by the immigration authorities, and that the evidence was insufficient to support the deportation warrant. The writ issued and a hearing was held at which the record of the hearing before the immigration inspector was introduced in evidence. The court (Kennerly, D. J.), after a careful examination of the record, found the allegations of the petition to be without substance. The writ was dismissed on December 5, 1939, and petitioner was remanded to the custody of the immigration authorities for deportation in accordance with the warrant. (R. 13–16.)

On May 20, 1946,[2] petitioner filed in the same district court another petition for a writ of habeas

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ing through the Department of State to obtain a passport for petitioner from the Greek Government. In August 1939 the Greek Government, after proof of petitioner's citizenship had been furnished to it, finally issued instructions to its consul in New Orleans to issue the passport. Petitioner was at liberty under bond during the intervening period.

[2] The files of the Immigration and Naturalization Service reveal that on December 21, 1939, after the dismissal of the first habeas corpus petition, petitioner was granted an extension of six months to dispose of his property. At the conclusion of that period, the Greek Consul at New Orleans was still unwilling to issue a passport. Since the Mediterranean was closed because of the war, the matter rested there until June 1945, when petitioner was ordered to surrender himself for deportation. He obtained a 90-day stay to file a motion to reopen the case, which motion was finally denied on March 29, 1946. When next ordered to surrender, he filed

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corpus, which gave rise to the present proceeding. Petitioner charged that the immigration authorities had taken him into custody and were about to remove him to New York for deportation to Greece. He repeated the allegations of the previous petition to the effect that he had not been accorded a fair hearing and that the evidence was insufficient to sustain the warrant. He also made the following new allegations: (1) that the immigration officers abused their discretion and erroneously construed the law in issuing the warrant;[3] (2) that the warrant, having been issued in 1935, had expired by operation of law; and (3) that, since the immigration inspector had made findings that petitioner was born in Turkey, immigrated from Turkey and was a citizen of Turkey, and since petitioner was not a citizen of Greece and had never been in Greece, he could not legally be deported to Greece. (R. 6–8.) No explanation was given as to why the new grounds had not been raised in the earlier petition; nor was any in-

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the habeas corpus petition involved in the present proceeding. The files also disclose that the Greek Ministry of Foreign Affairs has now instructed the Greek Embassy in Washington to issue a Greek passport to petitioner.

We have felt justified in referring to the files in order to explain the delays in effecting petitioner's deportation.

[3] We gather from the transcript of the hearing (R. 26–27) and from the present petition (Pet. 14) that the intent of this allegation was that petitioner could not legally be deported since there was no evidence that he had profited from the prostitution practiced by the women who frequented his dance hall.

dication given to the court that an earlier petition had been filed.

On the same day, the district court (Hannay, D. J.) issued an order to show cause directing the immigration authorities to produce petitioner and the certified record of his deportation hearing, and to "show cause" why the writ should not issue. The hearing was set for the following day. (R. 9.)

At the hearing on the following day, May 21, 1946, the Government produced petitioner and filed a motion to dismiss the petition on the ground that it failed to state any facts which would justify issuance of the writ. The Government also filed a return to the order to show cause setting forth the warrant of deportation and the proceedings on the 1939 habeas corpus petition before Judge Kennerly. (R. 10–16.) The Government's attorney stated that he did not have the certified copy of the deportation proceedings,[4] but he thought the court could proceed without it in view of the fact that Judge Kennerly had already reviewed the record and the matter was *res judicata* (R. 17–23). Judge Hannay stated that if he had known that Judge Kennerly had already reviewed the deportation record, he would not have ordered that record produced, and he re-

[4] The certified copy is kept in the Central Office of the Immigration and Naturalization Service in Philadelphia (see R. 29) and obviously could not have been produced in the habeas corpus court in Houston, Texas, in one day.

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fused petitioner's further motion to require the production of the certified record (R. 27–29). The court then refused to consider two of the new issues tendered, i. e., whether the Immigration Service had erroneously construed the law in petitioner's case (R. 26–27, 33), and whether his deportation to Greece, instead of to Turkey, was illegal (R. 25–26, 33, 35–36). So far as these matters were concerned, the court held that they should have been raised at the previous habeas corpus hearing and that it was foreclosed from further consideration of them by Judge Kennerly's action (R. 25, 26, 27, 29). Petitioner's attorneys made no attempt to show that the failure to raise these matters in the prior proceeding had been in good faith. The court, after hearing argument as to whether the deportation warrant had expired by lapse of time (R. 29–38), dismissed the writ, discharged the rule to show cause, and remanded petitioner to custody for deportation (R. 39–40).

On August 19, 1946,[5] petitioner filed a notice of appeal (R. 40–41). On the appeal, petitioner abandoned his contention that the warrant had expired, but he argued that the district court should have given him a hearing on the other two new allegations of his petition. The Circuit

[5] The files of the Immigration and Naturalization Service reveal that no immediate steps were taken to deport petitioner because his attorney had orally stated in court at the close of the habeas corpus hearing that an appeal would be taken.

Court of Appeals for the Fifth Circuit affirmed the order of the district court on the grounds that by not traversing the Government's return, petitioner admitted that he was held under a proper warrant, and that the petition stated no facts which would justify the issuance of the writ. (R. 44–48.) Judge Sibley dissented on the ground that sufficient facts had been alleged in the petition to justify a hearing as to whether deportation to Greece was proper (R. 48–49).

ARGUMENT

In essence, petitioner's contention in this Court is that his second habeas corpus petition raised two new issues in such a manner as to entitle him to a hearing, and that the doctrine of *res judicata* did not apply to his second habeas corpus petition (Pet. 8–14).

The first of the two new issues was that the immigration authorities had erroneously construed the law in ordering him deported when there was no evidence that he had profited from the prostitution practiced by the women who frequented his da..ce hall (R. 26–27; Pet. 14). But the petition did not raise this issue in such a manner as to call for a hearing. It stated no facts, but merely alleged that the immigration authorities had abused their discretion and erroneously construed the law (R. 7). Furthermore, even if the petition had alleged as a fact that petitioner had

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not profited from prostitution,[4] the rule of *Strench v. Pedaris*, 55 F. 2d 597 (C. C. A. 10), upon which petitioner relies (Pet. 14), would still not avail him. In that case, the circuit court of appeals held that an alien could not be deported as an "inmate of a house of prostitution" upon evidence which established only that his wife had practiced prostitution in a building which the alien owned and in which they had lived as man and wife. There was a vigorous dissent in the *Strench* case and the decision appears never to have been cited with approval. It clearly does not support petitioner, who was ordered deported for managing a dance hall frequented by prostitutes.

We think, however, with the dissenting judge below, that with regard to the second new issue tendered, the habeas corpus petition stated facts which, under ordinary circumstances, would have entitled petitioner to a hearing or at least to the production of the certified record of the deportation proceedings. The petition alleged that the immigration inspector had made findings that petitioner was born in Turkey, immigrated from Turkey and was a citizen of Turkey; it was further alleged that petitioner was not a citizen of Greece and had never been in Greece (R. 7). Section 20 of the Immigration Act of 1917 (*supra*, p. 3) provides that aliens may be deported (1) to

[4] The files of the Immigration and Naturalization Service show that there was no evidence that he had done so.

the country whence they came, or (2) to the foreign port at which they embarked for the United States, or (3) to the country of which they are citizens, or (4) to the country in which they last resided prior to entering the country from which they entered the United States. If the allegations of the petition were true, petitioner could not legally be deported to Greece.[7]

It remains then to be considered whether the district court was correct in refusing to hear petitioner on this point on the ground that his case had already been reviewed by Judge Kennerly. We think it is clear from the transcript of the hearing that the district court thought that the decision of Judge Kennerly was *res judicata*. In this the court was, of course, mistaken. However, we do not concede that the result reached was necessarily incorrect, for, as we have pointed out at length at pages 54–62 of the Brief for the Respondent in *Price* v. *Johnston*, No. 111, this Term, now pending before this Court, where successive applications for writs of habeas corpus are filed, the applicant must establish his good faith by explaining to the court why new matters urged were not presented in the original application. As has been noted above (*supra*, pp. 5–6, 7), petitioned did not attempt, either in his habeas corpus petition or at the hearing, to explain why the point of the

[7] Such an issue may properly be raised by petition for a writ of habeas corpus. *Mensevich* v. *Tod*, 264 U. S. 134.

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legality of his deportation to Greece, rather than to Turkey, had not been raised in his 1939 proceeding. We think the case is controlled by the decision of this Court in *Wong Doo* v. *United States*, 265 U. S. 239, which also involved a second petition for a writ of habeas corpus filed by an alien deportee. This Court, after ruling that the doctrine of *res judicata* is not applicable to habeas corpus proceedings, went on to say (265 U. S. at 241):

> * * * But it does not follow that the judgment should be reversed; for it plainly appears that the situation was one where, according to a sound judicial discretion, controlling weight must have been given to the prior refusal. The only ground on which the order for deportation was assailed in the second petition had been set up in the first petition. The petitioner had full opportunity to offer proof of it at the hearing on the first petition; and, if he was intending to rely on that ground, good faith required that he produce the proof then. To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of *habeas corpus*. No reason for not presenting the proof at the outset is offered. It has not been embodied in the record, but what is said of it there and in the briefs shows that it was accessible all the time. If an alien whose deportation has been ordered can do what was attempted here, it

> is easy to see that he can postpone the execution of the order indefinitely. Here the execution already has been postponed almost four years.
>
> We conclude that the judgment was right, although a wrong reason was given for it. The delay resulting from the course pursued by the petitioner had been unreasonable; * * *

Furthermore, even if it should be thought that the district court should have heard and decided the legality of ordering petitioner's deportation to Greece in view of his allegations that he immigrated from Turkey and was a citizen of that country, not of Greece, a reversal and remand of the cause to the district court for a hearing on that question would only result in further delay and could not affect the ultimate result. We have examined the central office file of the Immigration and Naturalization Service which was certified and introduced in evidence at petitioner's 1939 habeas corpus proceeding to ascertain whether there is any substance in his present contention. That file reveals that the inspector who held the hearing made findings that petitioner, although a Greek by race, was a citizen of Turkey, and recommended deportation to Turkey. But when an attempt was made to obtain a Turkish passport, it was discovered that petitioner had been born in a portion of Turkey which was ceded to Greece after World War I, and under the provisions of the

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Treaty of Trianon he had become a citizen of Greece. The finding was therefore revised to show that petitioner was a citizen of Greece and he was ordered deported to that country.[6] If the certified copy of the deportation proceedings had been produced in response to the district court's order to show cause, it would have been made clear then that petitioner's allegations of fact were without substance and the court would have been required to dismiss the petition. We submit that he has been given every consideration over a period of thirteen years and there is now no reason for any further delay of his deportation.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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FEBRUARY 1948.

[6] We have made this file available to the Clerk of this Court. The pertinent documents are indicated by identifying slips.

U. S. GOVERNMENT PRINTING OFFICE: 1948